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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DUCOING ENTERPRISES, INC., et al.,

Plaintiffs and Appellants,

v.

WINSTON & ASSOCIATES  
INSURANCE BROKERS, INC., et al.,

Defendants and Respondents.

G046734

(Super. Ct. No. 30-2010-00361854)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
David R. Chaffee, Judge. Affirmed in part, reversed in part, and remanded.

Foley Bezek Behle & Curtis, Roger N. Behle, Jr., Justin P. Karczag and  
Stephanie R. Hanning for Plaintiffs and Appellants.

Wood, Smith, Henning & Berman, Seymour B. Everett III and  
Tracy M. Lewis for Defendants and Respondents.

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## **INTRODUCTION**

Ducoing Enterprises, Inc. (DEI), and Ducoing Management, Inc. (DMI), sued Winston & Associates Insurance Brokers, Inc., doing business as Winston Insurance Services (Winston), an insurance brokerage, and John Place, an insurance broker, for negligence and other causes of action because they had not procured insurance coverage for employee dishonesty. DEI and DMI appeal from a judgment entered after the trial court granted Winston and Place's motion for nonsuit at the close of DEI and DMI's case-in-chief. As part of the appeal, DEI and DMI also challenge an order granting a motion in limine to exclude a certain communication. For the reasons we explain, we affirm the judgment against DMI, and, in all other respects, reverse the judgment and remand.

## **FACTS**

### **I.**

#### **Insurance Coverage for Brent and Ami Ducoing's Painting Business**

In 1984, on graduating from high school, Brent Ducoing started a painting business called "Perfection Painting." Initially, he operated the business as a sole proprietor, but, in 1987, formed DEI, which operated under the fictitious business name, Perfection Painting. Brent Ducoing managed the field operations of the painting business, while his wife, Ami Ducoing,<sup>1</sup> managed the office, including accounts receivable, billing, invoicing, payroll, day-to-day operations, and bank reconciliations. The Ducoings have high school degrees and no specific education or training in the field of insurance.

The Ducoings became acquainted with Place in 2001, when he sent them a letter soliciting their business. Ami responded by telephoning Place, who seemed eager

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<sup>1</sup> We will refer to Brent Ducoing and Ami Ducoing by their first names to avoid confusion; we intend no disrespect.

to take the call. Place said his firm specialized in brokering business insurance policies, he was an expert in that area, and he could obtain “the best coverage for the least amount.” Ami wanted to save money on insurance, but wanted proper coverage. She met with Place, who asked her a series of questions about the Ducoings’ business and put together a list of their areas of potential exposure. She informed him of the nature of DEI’s business and told him DEI did work out of state and had many employees.

Place told Ami he “was going to go back to different carriers and see what he can come up with as far as what offers he could present to” the Ducoings. He wrote several insurance policies for DEI, including general liability, contents coverage, and workers’ compensation. Ami understood that DEI was obtaining a “product coverage business policy” with “a lot of additional things” and nothing left out. On more than one occasion, Place said the insurance coverage for DEI “had all the bells and whistles.”

Ami often spoke with Place throughout the year, and would meet with Place or speak with him by telephone when the insurance policies came up for annual renewal. On renewal of one of the policies, Place asked Ami if there had been any changes and whether she wanted to increase the amount of coverage.

On one occasion, Ami contacted Place and asked him if terrorism coverage could be deleted. She faxed him the bill and a cover sheet, and signed a “declination of accepting terrorism coverage” to confirm her request and inform the insurance carrier she was declining that coverage. Winston sent her a letter acknowledging deletion of terrorism coverage. Ami did not recall ever signing anything from Place or an insurance carrier, in which she declined an entire form of coverage under a policy.

## **II.**

### **The Ducoings Form DMI.**

In 2003, the Ducoings formed DMI to “help offset some of the insurance costs from [DEI]” and to facilitate employment and administrative functions for Perfection Painting. The Ducoings had been advised by an accountant that it would be

advantageous to create another corporation. Place agreed it “was a great idea” and assisted the Ducoings in setting up the two-corporation structure.

DMI never contracted any painting jobs, owned any equipment, leased office space, had its own telephone number, paid any bills, or earned any revenue. All trucks and equipment used for painting jobs were owned by DEI. All revenue received by DMI came from DEI. All checks from clients for painting work performed by Perfection Painting were payable to DEI or DEI/Perfection Painting. The checks were deposited into DEI’s bank account. After a payroll service calculated the taxes and insurance payments that were required to be deducted, DEI transferred money from its general account into separate payroll accounts for DEI and DMI to cover the payroll of each company. Persons engaged in work for Perfection Painting might be employed by DEI or DMI and transferred internally between them, depending upon each company’s workers’ compensation insurance rates. Ami testified, “[i]t’s strictly based upon the insurance rates, and the only difference is the employees’ paychecks have a different name.” Place knew DEI and DMI were operated in this fashion.

DEI and DMI remained separate entities with different officers, books, and bank accounts, and maintained separate addresses registered with the California Secretary of State. DEI and DMI paid insurance premiums from different bank accounts and had separate payroll accounts.

In 2008, of the about 50 employees who performed work on Perfection Painting jobs, two worked with Ami in the office and the others worked in the field. Whether employed by DEI or DMI, all those performing work on Perfection Painting jobs wore shirts with the words “Perfection Painting” on them and drove in trucks that displayed the words “Perfection Painting.” Brent signed all painting contracts for Perfection Painting on behalf of DEI, and clients would receive invoices from Perfection Painting and DEI. DMI never sent invoices for or received payments from painting jobs.

### **III.**

#### **The Embezzlement Scheme**

In 2002, DEI hired Veronica Navarro to work in the warehouse. In 2003, Navarro began assisting Ami in the office. At that time, Navarro was an employee of DMI, and, some time later, her employment switched back to DEI. In 2008, Navarro, while employed by DEI, assisted Ami in compiling employee hours and preparing timesheets. At the end of each pay period, Navarro would present the timesheets to Ami, who would review them with the field supervisor and submit them to the payroll service. Employee payroll was processed in the same way for both DEI and DMI: the timesheets for DEI and DMI were deposited into the same lockbox, and Navarro and Ami processed timesheets and payroll checks. DEI and DMI used the same payroll service, but had different payroll accounts.

In July 2008, the Ducoings noticed irregularities in the payroll accounts, namely, expenses were inexplicably increasing. Ami reviewed a log of employee hours with a field superintendent, who noticed entries from one person who had not worked on Perfection Painting jobs for several months. Ami investigated every employee to whom a paycheck had been issued to verify whether the employee had actually worked the hours for which he or she had been paid. Ami discovered there were “employees” to whom paychecks had been issued, but who never had been employed.

Ami uncovered a fraudulent check-cashing scheme by which Navarro stole money from DEI through a manipulation of timesheets and payroll records. From February to July 2008, Navarro used personal information from unsuccessful job applicants to create “ghost employees.” Navarro created timesheets for those ghost employees and used their names to transfer funds from DEI to DMI’s payroll account. Paychecks for the ghost employees would be issued from DMI’s payroll account. An accomplice or accomplices of Navarro would take those paychecks to check-cashing services in Orange County and have them endorsed for cash.

After contacting the police, Ami called Place to inform him of the loss and determine how to make a claim. Place said nothing to suggest the loss was not covered, but told Ami a criminal conviction was necessary before a claim could be submitted.

#### **IV.**

##### **Investigation, Loss, Conviction, and Insurance Claim**

Ami actively participated in the police investigation of Navarro. After reviewing records, she compiled a list of checks for each ghost employee who improperly received a check. The names on the list were those of people who appeared on timesheets and received paychecks but never did work for Perfection Painting. For each check, Ami provided the date of issuance, the amount, and the place where it was cashed. Most of the checks were issued from DMI's payroll account because Navarro, without authorization, transferred funds from DEI to DMI.

Navarro embezzled a total of \$92,818. The Ducoings were able to stop payment on checks totaling \$6,867. The banks provided the Ducoings with affidavits of forgery, which, if signed by the purported payee, notarized, and presented to the bank that cashed the check, would enable the Ducoings to obtain a refund. By means of the affidavits of forgery, the Ducoings were able to recover \$38,277 from the banks. Those funds were returned to DEI. The Ducoings also obtained miscellaneous recovery of \$4,371, leaving unrecovered losses of \$43,303.

In March 2009, the Ducoings, through DMI, sued the check-cashing businesses after they refused to voluntarily return the remaining funds. Following a bench trial, the Ducoings received a judgment against the check-cashing businesses, totaling \$69,000, only a small part of which has been paid. DEI spent about \$63,000 in legal fees and costs in that litigation. Based on unrecovered losses, mitigation costs, legal fees and costs, and interest, the Ducoings' damages expert calculated the damages resulting from Navarro's embezzlement to have been \$95,600 at the time of trial.

One or two weeks after learning Navarro was convicted, Ami called Place and notified him of the conviction. Based on his earlier representation, she understood that Place would submit a claim now that a criminal conviction had been obtained. In March 2010, however, Place informed Ami there was no coverage for the loss caused by Navarro. Ami was surprised because the policy had been in place since 2002, it was always renewed, and “[w]e never added or deleted coverage outside of adding or subtracting pieces of equipment.” In an e-mail, Place told Ami that he had contacted the insurance carrier to find out why employee dishonesty coverage was not included in the current policy. He recalled that employee dishonesty coverage had been in the prior policies and did not know why it was not in the current policy. Ultimately, Place informed Ami the policy did not include employee dishonesty coverage.

#### **PROCEDURAL HISTORY**

DEI and DMI brought this lawsuit against Winston and Place for negligence, negligent misrepresentation, breach of fiduciary duty, and damages based on the tort of another doctrine. The claims were tried to a jury over several days in January 2012.

On the first day of trial, the court granted Winston and Place’s motion in limine to exclude evidence of a communication between Place and Ami, on the ground it was a settlement communication. Before granting the motion, the trial court conducted a hearing under Evidence Code section 402, at which Ami testified.

At the close of DEI and DMI’s case-in-chief, Winston and Place moved for nonsuit on three grounds: (1) lack of evidence of a loss by DMI that would have been covered by DEI’s insurance policy; (2) insufficient evidence to establish that Winston and Place were vicariously liable for each other’s actions; and (3) lack of evidence of damages suffered by DEI because it successfully recouped its losses. The trial court granted the motion for nonsuit on two grounds: (1) Winston and Place were agents for

DMI only for procuring workers' compensation insurance, and for no other purpose, and therefore owed DMI no duty to procure employee dishonesty coverage for DMI; and (2) DEI suffered no compensable loss because Navarro embezzled money from DMI, not DEI. Judgment in favor of Winston and Place was entered in March 2012. DEI and DMI timely appealed.

## **DISCUSSION**

### **I.**

#### **Order Granting Motion for Nonsuit**

##### *A. Standard of Review*

We review an order granting nonsuit de novo, using the same standard as the trial court. (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) A defendant is entitled to a nonsuit if the court determines, as a matter of law, the evidence presented by the plaintiff is insufficient to permit a jury to find in the plaintiff's favor. (*Ibid.*) The court must not weigh the evidence or consider witness credibility; must accept as true the evidence most favorable to the plaintiff; and must draw every reasonable inference, and resolve all presumptions, conflicts, and doubts, in the plaintiff's favor. (*Ibid.*) Evidence is legally insufficient when no substantial evidence exists tending to prove each element of the plaintiff's claim. (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 263; *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750-751.)

##### *B. DEI Suffered a Loss Because Navarro Transferred the Embezzled Money, Without Authorization, from DEI to DMI.*

The trial court concluded DEI suffered no loss because Navarro embezzled money by having checks drawn from DMI's payroll account. The court explained: "The evidence in this case . . . is there were only two checks that were actually embezzled from [DEI], and both of those were fully reimbursed, so the only loss suffered was loss to [DMI]. . . . I can't accept the argument that allows the blurring of the lines that [DMI]'s



money is [DEI's] money and [DEI's] money is [DMI]'s money because that completely ignores the corporate fiction that the Ducoings had to agree to accept when they set up these two separate corporations.”

The trial court erred. The evidence at trial established that all of the money stolen by Navarro came from DEI. Using information from unsuccessful job applicants, she created ghost employees and false timesheets for them. She embezzled money from DEI by making unauthorized transfers of money from DEI to DMI and issuing checks drawn from DMI's payroll account to pay those ghost employees. The evidence showed that all revenue received by DMI came from DEI. All checks from clients for painting work performed by Perfection Painting were paid to DEI or DEI/Perfection Painting and deposited into DEI's bank account.

This is not a matter of blurring corporate distinctions, as the trial court stated. The money embezzled by Navarro came from her employer, DEI. Although the falsified checks were drawn from DMI's payroll account, the money came from DEI. Navarro simply took the preliminary step, in all but two cases, of transferring money from DEI to DMI. As DEI and DMI argue: “Ms. Navarro stole money from DEI. The way she stole it was by first wrongfully moving it into DMI, where she had access to it. Just because she wrongfully moved it first somewhere else does not mean it was DMI's money . . . . It did not become DMI's money when she wrongfully transferred it from DEI to DMI any more than it would become her money if she wrongfully transferred it from DEI directly to her own bank account.”

*C. DMI Would Have Had No Claim Under Employee Dishonesty Coverage Because Navarro Was an Employee of DEI.*

The trial court also granted nonsuit on the ground Winston and Place were the agents for DMI only for the purpose of procuring workers' compensation insurance, “had no other role with respect to insuring [DMI],” and, therefore, had no duty to DMI to procure employee dishonesty coverage.

The parties argue at length the issue whether Winston and Place owed DMI a duty of care.<sup>2</sup> But one fact is dispositive: Navarro was not an employee of DMI at the time her dishonest conduct occurred. She was employed by DEI. Thus, even if Winston and Place owed DMI a duty of care, and breached that duty of care by failing to procure employee dishonesty coverage for DMI, no claim could have been made by DMI under such coverage.

## **II.**

### **Order Granting Motion in Limine**

The trial court granted a motion in limine brought by Winston and Place to exclude evidence of a settlement communication, in particular, testimony that Place told Ami “he felt so confident that coverage was there, and because [the Ducoings] were out the loss, he would be willing to front the \$10,000 and he would deal with the insurance company directly for reimbursement.”

Trial court error warrants reversal only when it is reasonably probable a result more favorable to the appealing party would have been reached in the absence of the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.) Here, the grant of the motion in limine had no bearing on the court’s decision to grant nonsuit against DEI and DMI. The court granted nonsuit against DEI and DMI on grounds unrelated to the one communication not admitted into evidence. Thus, even if the court erred by granting the motion in limine, it was not reasonably probable that, absent the error, the court would have denied Winston and Place’s motion for nonsuit. We express no opinion on the

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<sup>2</sup> An insurance agent has a duty to use reasonable care, diligence, and judgment in procuring the insurance requested by its client. (*Williams v. Hilb, Rogal & Hobbs Ins. Services of California, Inc.* (2009) 177 Cal.App.4th 624, 635; *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp.* (1993) 12 Cal.App.4th 1249, 1255-1257.) But, “as a general proposition, an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage.” (*Williams, supra*, 177 Cal.App.4th at p. 635.)

merits of the court's decision on the motion in limine. Because the matter is reversed as to DEI, this issue can be raised by both sides in any retrial.

**DISPOSITION**

The judgment against DMI is affirmed. In all other respects, the judgment is reversed and the matter is remanded for further proceedings. In the interest of justice, no party may recover costs incurred on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.